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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

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**ALPHONSO NICHOLS,**

*Petitioner,*

vs.

**UNITED STATES OF AMERICA,**

*Respondent.*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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*To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Alphonso Nichols, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on September 18, 1963.

## JUDGMENT AND OPINION OF THE COURT BELOW

On September 18, 1963, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, sentencing defendant to imprisonment for a term of seven years. The Court of Appeals' opinion has not as yet been reported. It is printed herewith as Appendix A.

## JURISDICTIONAL STATEMENT

On a jury trial, defendant was convicted of violations of the narcotics statutes, 26 USCA 4705 (a) and 21 USCA 174.

On appeal, the judgment was affirmed by the United States Court of Appeals for the Seventh Circuit in an opinion filed September 18, 1963. (Appendix A).

The jurisdiction of this Court is invoked under the provisions of Title 28 U.S. Code Section 1254(1).

## QUESTIONS PRESENTED FOR REVIEW.

1. In a prosecution for the sale of heroin, where evidence is introduced concerning sales not referred to in the indictment, may the trial court limit its instruction to a mere reading of the Statute forbidding the sale of narcotics, without informing the jury of the allegations of the indictment or the elements of the offense?

—or—

Must the Court instruct the jury as to the allegations made within the indictment, and the essential elements which the government must prove?

2. In a prosecution charging, in five counts, the receipt and concealment of unlawfully imported heroin, may the trial court limit its instruction on the nature and elements of the offense, to a statement in gross of the Count numbers, a statement in gross of the dates alleged, and a statement of the quantities involved, together with a reading of the statutory language?

—or—

Must the court inform the jury of the essential elements which the government is required to prove, define the terms used in the statute, relate the charges to the evidence, and treat each count as a separate offense?

3. Where, at the instance of the government, and under its supervision, a special government employee purchases a substance believed to be a narcotic, and thereupon disposes of that substance for his own purposes, so that it is not available as evidence, and where the substance has never been analyzed or examined by any expert,

May the government prosecute the alleged seller, using secondary evidence of the nature of the substance so despoiled by its agent?

4. Where a witness considers himself addicted to the use of narcotic drugs, but has no personal knowledge as to the nature of the drug that he has been using, and receives no distinctive reaction from the application of the drug,

May a substance be identified as a specific narcotic through the addict's testimony that he received, through its use, the same reaction that he experienced in the past from applications of unrelated and unidentified substances?

5. Does the narcotics traffic present a peculiar peril to society, sufficient to justify the application, in narcotics prosecutions, of rules and standards which would be deemed untenable in prosecutions of other types of offenses?

## STATUTES INVOLVED

26 U.S.C.A. Section 4705 (a) provides as follows:

> "It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate."

Title 21 U.S.C.A., Section 147 provides as follows, in relevant part:

> "Whoever fraudulently or knowingly receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug * * * knowing same to have been imported contrary to law, shall be [punished].
>
> * * *
>
> "Whenever on trial for a violation of this section, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

## STATEMENT OF THE CASE

(Nine copies of the printed record used in the Court of Appeals, have been filed pursuant to Rule 21(4). It is hereafter cited as "A. *(page)*.")

Defendant was charged in an eleven count indictment relating to traffic in heroin. Two counts, as to which no evidence was introduced, were dismissed on the Government's motion at the close of the prosecution case. The jury rendered a verdict of guilty in the remaining nine counts and judgment was entered on that verdict. On Appeal, the judgment was affirmed on all counts.

Defendant lived with one Dorothy Nichols, known as his wife. On February 28, 1957, defendant and Dorothy rented as joint tenants a safety deposit box at a Chicago bank. (A. 12). Thereafter, numerous entries were made into the box by Dorothy, (A. 4) but defendant never sought or gained admission to the vault area. (A. 4; 15)

In June of 1961; Dorothy was killed by lightning. (A. 14). Shortly thereafter, defendant sought admission to the vault, stating that he had to make funeral arrangements. The vault officials advised him that the vault could not be entered save in the presence of a representative of the Illinois State Treasurer because of possible tax liability. They made an appointment for defendant with the State Treasurer's representative to open the box. (A. 14)

Defendant appeared for the appointment with an attorney, and the box was opened in the presence of the treasurer's agent and a bank official. The box yielded approximately $12,000.00 in cash, a small pistol with bullets, and some packages of white powder. (A. 12, 13)

Asked what the white powder was, defendant replied that it was his wife's "good luck" powder. (A. 13) At the trial, he testified that Dorothy burned a form of in-

cense as an incident to her "playing the numbers;" when the incense burned down, a number appeared which was the number that she would play. (A. 35) The Treasurer's representative re-sealed the box and reported the matter to her office. (A. 13) Her superiors contacted the Federal Bureau of Narcotics, one of whose agents obtained a search warrant for the vault. The vault was then drilled and opened, and defendant taken into custody. (A. 16)

## THE SPAULDING COUNTS.

In April of 1961, Charles Perry, an addict, was working as a special employee of the Narcotics Bureau. His duties related to the making of "buys" for the Government. His employment continued to the time of trial, and he was compensated, "if he was successful". (A. 6, 7)

On April 5, 1961, Perry, having been searched by narcotics agent Cook, was given $380.00. Perry then went to the apartment of Steve Spaulding. (A. 6)

At the time of the trial, Spaulding was an inmate of Stateville Penitentiary, serving a term of two to eight years resulting from a conviction for three transactions involving the sale and possession of narcotics. He had been an addict for about thirteen years, and had also been convicted of robbery in 1940 and in 1954. (A. 7, 10) Both Spaulding and Perry testified against the defendant.

Both testified that on the evening of April 5th, Perry came to Spaulding's apartment and gave him some money, whereupon Spaulding called defendant's number. Perry then waited in Spaulding's apartment. Spaulding testified that his telephone call was to defendant, whose voice he recognized, and whom he told that "he wanted to make

up," which to Spaulding meant to buy drugs. Spaulding stated that he then went to defendant's home, paid defendant $220.00, and received in exchange two glassine packages. Spaulding returned to his own basement, where he diluted the "stuff" with milk suga and mannite and gave the resulting mixture to Perry. (A. 6, 8)

Perry testified that he then gave the package to Cook. (A. 6) Subsequent analysis determined that the substances contained heroin hydrochloride. (A. 19, 26)

From further testimony of Perry and Spaulding it appears that on April 10th, Perry brought Cook to Spaulding's house and introduced him as "Lonnie". (A. 6, 8) Perry then gave some money to Spaulding, who left, returned in two hours, and gave Perry a package. Subsequent analysis disclosed the presence of heroin hydrochloride. (A. 32)

Spaulding testified that on April 10th, upon receiving the money from Perry, he again called defendant's home and this time spoke to Dorothy. He went to defendant's home, gave Dorothy $220.00, and received from her some glassine packages. He again returned to his basement, mixed the contents in the packages with milk sugar and mannitte, and delivered the resulting mixture to Perry. (A. 8)

On April 19, 1961, Cook came to Spaulding's home and gave him $300.00. Outside Cook's presence, Spaulding made a telephone call which, he testified, resulted in a conversation with defendant. He told the defendant he wanted to "make up." Spaulding went to defendant's home, surveilled by a narcotics agent. He was admitted to the apartment by Dorothy, and gave her $220. Dorothy went

upstairs and returned with two packages of "stuff", which she wrapped. At that point, Spaulding testified, defendant entered and asked witness whether he was being followed. A man was visible from the window. Defendant told witness he had better wait a while, and directed Dorothy to return his money. Spaulding left the apartment carrying garbage to see whether he was being followed. He then wandered around for several hours, returned to defendant's home, and gave him $220. Defendant, according to Spaulding's testimony, cautioned Spaulding to be careful, and gave him two packages, whose contents Spaulding mixed with milk sugar and mannitte in his basement, prior to delivering the resulting mixture to Cook. (A. 9) The mixture, when analyzed, contained heroin hydrochloride. (A. 26)

On May 8, Spaulding was arrested. He made a full confession to the narcotics agents. His statement was reduced to writing and signed by him. It was produced at the trial. Although the witness claimed that the statement related the incident of April 5, no such transaction was therein mentioned. (A. 10) On July 18, he gave a statement to narcotics agents relative to the transaction of April 19th. That statement contains no reference to defendant's asking him whether he was being followed. (A. 10) Spaulding further testified that he was unable to remember whether any recommendation was made to the Court at the time of his sentencing. (A. 11)

The first six counts of the indictment relate to the Spaulding transactions. Defendant was charged with unlawful sale of narcotics, and with traffic in narcotics unlawfully imported, on each of the three dates to which the Spaulding testimony relates.

## THE MACK COUNTS.

On May 11, 1961, addict Mack received $280 from agent Cook. He testified that he then called defendant and requested "two spoons of stuff". Defendant, according to Mack, said they should wait an hour because he had heard of Spaulding's arrest. (In fact, Spaulding had been arrested three days earlier; A. 10). The delays were protracted, and although during the course of the night Mack gave defendant all the money except $10.00, no narcotics were passed. At about 7:00 the next morning, Cook went home. An hour and a half later, according to Mack's testimony, defendant called him and told him to meet Dorothy at a store. Dorothy arrived, and delivered about a half ounce of powder (A. 31) to witness. Witness injected some of the powder into his arm, and gave the rest to a friend. (A. 28, 29)

At the time, witness had been an addict for more than two years. (A. 27) He testified that from the injection he gave himself, he received the same reaction he always did. His testimony in this aspect is discussed in detail within the argument.

Count X of the indictment charged the unlawful sale of heroin to Mack, and Count XI charged traffic in the same heroin, alleged to have been imported unlawfully. Defendant was convicted on both counts.

## THE SAFE DEPOSIT BOX.

Count VII charged the transportation and concealment of the heroin found in the safe deposit box, alleged to have been imported unlawfully. The date of the alleged offense is June 27, 1961, (A. 2) the date on which the search warrant was executed. (A. 16)

Government witness Mack claimed to have given to the defendant the gun found in the box, or one "definitely similar". (A. 28, 30) Of the money in the box, $160.00 was shown by the serial numbers to have been among the bills furnished to Perry by Cook on April 5, 1961. (A. 16)

## DEFENSE EVIDENCE.

The defendant testified and denied the accusations of Spaulding and Mack in their entirety. He claimed that he knew Mack only as the boy friend of a girl who formerly lived in defendant's building. He stated that he had been aware, though not by personal observation, of meetings between Spaulding and Dorothy, and that it seemed wrong to him. The only time he saw Spaulding with Dorothy, he chased him out of the apartment. The gun found in the box resembled a gun which Dorothy once showed him and stated that she had obtained from a friend. Defendant told her to get rid of the gun, and did not know or care what she had done with it. (A. 34-36)

Defendant flatly denied any sale or possession of narcotics, and stated that he did not know that any such substance was to be found within the safety deposit box. (A. 35)

## BASIS OF FEDERAL JURISDICTION.

The action was commenced by the return of an indictment by a federal grand jury, alleging the violation of a federal statute.

## REASONS FOR ALLOWANCE OF THE WRIT.

Within the rule which your Honors have published delineating the class of cases likely to be deemed worthy of review on certiorari, this Court has made reference to situations

> "Where a court of appeals * * * has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court * * *" (Supreme Court Rule 19)

While it would appear at first impression that the cited standards are mutually exclusive, we here present to your Honors a case which falls within both categories.

The Court of Appeals' opinion which we ask this Court to review, calls into question the philosophy underlying the largest single class of federal criminal prosecutions.

No informed person will challenge our assertion that in narcotics prosecutions, many courts have condoned prosecutive theories and practices which would be regarded as outrageous in any other class of case.

The relevant Statutes are sufficiently harsh to satisfy the most determined participant in the "war against crime." A special immunity statute has been enacted. (18 U.S.C.A. 1406) To facilitate federal prosecutions, narcotics are presumed to have been imported (21 U.S.C.A. Sec. 174). In order to assure that the Courts will not offer unseemly solace to the addict, both the discretion to exercise reasonable leniency and the power to admit offenders to probation have been withdrawn. In order to assure that he shall have no assistance or supervision in readjusting to the society

which has ostracized him, the executive branch of the government has been denied the power to admit him to parole. (26 U.S.C.A. Sec. 7237d) Thus, parole officers are admonished to channel their efforts toward the rehabilitation of offenders who may have some salvage value, so that recidivism in the fields of counterfeiting, kidnapping and treason may be reduced. The addict, however, is beyond redemption, having renounced the very society of which he is a part by his voluntary choice of narcotics addiction.

No class of narcotics offender is spared. The addict is adeemed to possess the drug to which he is addicted, through his own choice. In satisfying his addiction, he is conclusively presumed to have made a conscious and voluntary choice to commit a felony by taking possession of the narcotic. The seller, on the other hand, is considered to be an especial object of revulsion, because the dissemination of his commodity is said to result in the enslavement of the purchaser, depriving him of his very will through the pernicious addictive qualities of the narcotic.

These obvious contradictions do not impair the validity of the Statutes involved. Statutes are not required to be logical. Within Constitutional limitations, Congress may do as it will. The will of the Congress is manifest in the fact that we are the only nation of the western world which enforces its revenue laws with the death penalty. 21 U.S.C.A. 176b.

The judicial system, on the other hand, holds as its most highly prized attributes, a lively sense of logic and a refusal to sacrifice basic principles of jurisprudence to the expediencies of the moment.

Thus, the courts have a Constitutional duty to give effect to those Congressional enactments which do not offend the Constitution itself. In dealing with narcotics offenses, the courts *must* impose penalties within the limits established by Congress, and adjudge guilty those persons who have in fact done what the Congress has prohibited.

But with equal force, it is fundamentally true that the courts have a duty to disregard the nature of the accusation in evaluating the quantum and quality of the prosecution proof, and in applying the presumption of innocence.

The very frequency with which narcotics prosecutions are brought in the federal courts, tends to jade the observer and to intensify the image of the offender as an enemy of society. In this climate, it is perhaps not surprising that certain rules of convenience have been adopted to streamline such prosecutions.

History is not lacking in precedent for judicial determinations influenced by popular revulsion toward the nature of the accusation itself. Indeed, it is the very history of such political disasters, which forms the basis for the present petition.

We ask that your Honors make a searching and critical appraisal of the state of narcotics prosecutions in federal courts at the present time. We believe that the situation is exemplified in the record before your Honors.

The prevalent attitude is that if a given quantum of evidence represents all that is reasonably available in support of a prosecution under the narcotics statutes, it must necessarily be enough to convict. Otherwise, the unspoken argument concludes, the defendant might be acquitted.

If this analysis seems harsh, it seems also unfortunately to be accurate. Consider the record before your Honors.

Two of the Counts relate to a supposed narcotic substance which was purchased by one Mack, an addict who was acting at the direction of Federal Narcotics agent Cook. Cook provided Mack with the necessary money and accompanied him in the initial stages of the attempted purchase, but Mack was unable to buy any narcotics that night, so Cook finally went home. A few hours later, Mack purchased a substance from petitioner's wife. (A. 31) He injected some of it into his arm, and gave the rest to a friend. (A. 28, 29) Understandably, Cook was not asked about this transaction when he testified as a government witness. (A. 18-22) But Mack, called as a later witness for the government, told this story. Defendant denied any participation, and disclaimed knowledge of what his wife may have done. Since the government had produced the best case available under the circumstances, the defendant was convicted.

No ordinary civil litigant would have been permitted to recover on speculation as to the nature of a substance unavailable as evidence because he had himself despoiled it. Mack was operating under the direction of Agent Cook, and was paid by him. He was therefore, for all purposes, "Agent" Mack, as surely as if he had worn a badge. *Sherman v. United States*, 356 U. S. 369, 373. His spoliation of the corpus delicti by using part of it and placing the rest in commerce while Cook slept, would ordinarily bar prosecution based upon conjecture as to what the agents despoiled.

But this was a narcotics case, and therefore a different set of rules must apply. The government introduced all of the evidence reasonably available at the time of trial, making due allowance for Cook's obvious reticence. The evidence was therefore deemed sufficient.

Narcotics prosecutions are perfunctory. But the grim determination to fit within the recognized structure of law, anything necessary to rationalize the defendant's imprisonment as proper, leads to truly ludicrous situations. One is hard put to repress a mental image of the statue of Justice, clad in a bikini, carrying a stiletto and a pulp magazine, and peering suggestively around her blindfold. All the elements are there; in travesty.

Consider the government's attempt to prove that the substance received by Mack, was heroin, as the indictment alleged. The government solemnly undertook to qualify Mack as an "expert" in a limited and highly specialized field: the effect of heroin on Ernest Mack. (A. 27)

In support of Mack's "expertise", the Government showed that his wife was employed by the Telephone Company, that Mack had completed high school and a year and a half of Junior College, and that Mack's father was a minister (A. 27).

The basic educational and moral qualifications having been shown, the witness was next asked to show that he was familiar with heroin. He demonstrated erudition in this field by stating that he had many times asked for heroin and been given a substance in pursuance of that request (A. 28, 31, 32).

By way of demonstrating his ability to recognize heroin, or at least to distinguish it from castor oil, the witness described its physical effect in the following language: "It leaves you with a sluggish feeling; makes you feel different. I can almost say it makes you feel good in certain respects. Other than that, there is no other." (A. 27)

The Court evinced an interest in corroboration of the conclusion of the expert witness, and felt that a showing that the price paid by the witness for the comparison

substances received by him was disproportionate to the value of a comparable quantity of any legitimate substance. The witness thereupon testified that he paid $1.50 per capsule (A. 27), neglecting to indicate the size of the capsule. While we doubt that the witness trafficked in capsules of the size or value used to transport astronauts, our doubt is not based on the record before your Honors.

The witness admitted that he has seen cocaine and dolophine, and that both resemble the substance he claimed to have obtained from defendant. Witness further disclaimed any idea of what reactions those compounds, or morphine would have on him. He conceded that dolophine is used to taper off the habit of addicts, and it must therefore be presumed that the physical effects of these substances could not be greatly dissimilar to those experienced by the witness, even assuming that witness was accustomed to heroin. The witness further admitted that the only reason that he believed that he was familiar with heroin was that other people, unnamed, whose expertise is not even a proper subject for conjecture, told him that he was geting heroin, and that if it had been something else, he would have no way of knowing it. (A. 30, 32)

The foregoing evidence was held by the trial court to be a sufficient basis for a jury to find defendant guilty beyond a reasonable doubt of selling heroin to Mack a charged in Counts X and XI of the indictment. The jury accordingly so found, and thereby obviously concluded that the defendant was guilty by the chain of reasoning next hereinafter recited:

1. Nothing except heroin could have made Mack feel "sluggish, different, and almost good in certain respects."

2. Mack got something from the defendant which made him feel that way.

3. Therefore, Mack got heroin from the defendant.

If the foregoing "reasoning process" seems characterized by a lesser degree of certitude than that which would keep an ordinarily prudent person from pausing to reflect whether a contemplated course of action was indeed proper, this Court need not conclude that the standard of "reasonable doubt" has been lowered beyond the horizon of logic. For as we previously indicated, this was a narcotics prosecution, wherein exceptional rules of enlightened expediency are applied.

Such precedent as exists for this type of "expert evidence" is to be found, as might be expected, in narcotics cases. It first appeared as *dicta* in *Toliver* v. *United States*, 9 Cir. 1955, 224 F.2d 742, 745. The concept was not further exploited until the decision in *United States* v. *Agueci*, 2 Cir. 1962, 310 F. 2d 817, 828. *Agueci* was a "hard" case, and accordingly became a fit testing ground for the new weapon. The "expert addict" concept appears in *Agueci*, not as *dicta* but as established precedent. In the case at bar, the "expert addict" concept has been applied to a government-controlled purchase by a government agent. It is now the law of the land, so far as it can be without your Honors' expression.

So far as any opinion shows, no witness in *Toliver* or in *Agueci* had any knowledge, other than amorphous hearsay, as to the nature of the substance to which he considered himself addicted. None had any information to offer which would distinguish heroin from dolophine, novocaine, or any number of other substances not named in the indictment. But the Courts solemnly found that the substance involved was heroin, in the absence of any cogent evidence whatever. So, in the case at hand, a similar result was reached.

Neither in *Toliver*, *Agueci*, nor the case at bar, was any medical, psychological, or other expert heard to say that an addict is influenced by what he is in fact given, rather than what he believes he has been given. One possible reason for this omission, is that no such evidence is available. There is simply no scientific basis for the belief that an addict can tell whether he has in fact received any narcotic drug, much less that he could identify it. The whole concept is simply a legal fiction, designed to implement the concept that in narcotics cases, the totality of the evidence *must* suffice to convict.

We would refer your Honors to the scholarly volume entitled "Opiate Addiction" by Prof. Alfred Lindesmith of Indiana University (Principia Press, Inc., Bloomington, Indiana, 1947): Chapter 2 of that work, and especially pages 31 to 37, demonstrate the falsity of the claim that the addict is affected by what he actually gets, rather than what he is told that he gets.

As shown by Prof. Lindesmith's experiments and research, an addict given an injection of saline or other inert matter, and told that he is receiving heroin, is as likely to be deceived as not. Conversely, an addict given opiates, but told that he is receiving something else, is deceived with equal frequency. The element of psychology has an enormous effect in determining the addict's reaction to whatever substance he receives. This fact is well known to the scientific community.

The reaction of the "expert addict" is very much less reliable than a number of technologies, such as the polygraphic detection technique, which are rejected by the courts for lack of scientific acceptance. But the "expert addict" test is now about to become settled law, without the slightest inquiry as to its scientific basis.

* * *

The treatment of the jury instructions in the case at bar, exemplifies the superficial handling which is typical of this class of case. All of the forms are observed; none of the substance is deemed important.

The jury heard evidence of a number of sales of narcotics by one Spaulding to a special government employee named Perry. There was evidence of an unlawful transfer of narcotics from "expert addict" Mack to a friend named Penn. There was further evidence of such sales by Dorothy Nichols.

The jury were carefully instructed on the theory of vicarious liability (A. 43, 44). Thus, they might have concluded that the defendant was guilty of causing one or more of the sales above referred to, and that he was thus guilty of selling narcotics.

But the defendant was not charged with "selling narcotics", nor could he have been so charged within Constitutional bounds. He was charged with four specific sales on four specific dates: three to Spaulding, and one to Mack (A. 1, 2). And this is what the jury were never told.

With reference to the counts charging the sale of narcotics, the jury were told that a statute forbade such sale. The statute was read to them (A. 48).

And that is all they were told.

They were not told which of the numerous sales referred to in the record, were charged in the indictment against the defendant. They were left to make their guess as to what facts were relevant, and as to what they would have to find in order to return a verdict.

It is true, as the Court of Appeals opinion states, that no specific objection was made in the trial court. But it was urged in the Court of Appeals that your Honors had ruled that even in the absence of any objection at all,

> "* * * (W)here the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which conviction could rest, we think it is necessary to take note of it on our own motion."
> *Screws* v. *United States*, 325 U.S. 91, 107.

The Court of Appeals met this objection by reference to *United States* v. *Jonikas*, 7 Cir., 1952, 197 F. 2d 675, 679. In *Jonikas*, a convicted prisoner brought a petition under Title 28 U.S.C.A. Sec. 2255. In effect, he collaterally attacked his conviction. He urged that the instructions, which were similar to those in the case at bar, were so grossly inadequate as to render the judgment of conviction void. On appeal—not from the judgment of conviction, but from denial of the petition under Section 2255—the Court of Appeals held only that the instructions did not "deprive the court of jurisdiction to enter the judgment."

It was on the basis of the *Jonikas* decision, that the Court of Appeals approved the instant conviction. In effect, the Court of Appeals has held that if jury instructions are not so grossly inadequate as to deprive the trial court of its very jurisdiction, the instructions are correct.

In no other class of case would such a result be reached. A defendant has every bit as much right to have the jury informed of the nature and cause of the accusation against him, as to be so informed himself. The one right is useless without the other.

The instruction on the possession counts was, in ultimate terms, fully as inadequate as the instruction on the sale counts. Although the Count numbers (erroneously in part), the relevant dates, and the amount of narcotics in-

volved were given to the jury in bulk, there was no attempt to relate the charges to the evidence, or to tell the jury what the government had to prove, or to advise them what facts they must find to be true in order to warrant a conviction. (A. 48, 49)

Certainly, the instructions given the jury on the nature of the charge against the defendant, fail the most fundamental tests of certainty. Had the defendant been told by the indictment no more than the jury was told by the trial court, he could never have prepared a defense or asserted a claim of double jeopardy. And it must follow that the jury was, by the instructions complained of here, turned free to convict the defendant on general principles rather than to judge his guilt of specific offenses.

The monolithic principle thus casually violated, was well expressed in *Kenion* v. *Gill*, 155 F. 2d 176, 179, D.C. Cir. 1946:

> "It is reversible error for the trial court to fail to define the various crimes involved in the indictment, and to fail to define the elements of each, to the extent necessary to permit the jury to apply the law to the facts."

Such was the laxity of the court in defining the relevant elements of proof, that the jury could well have concluded that for the defendant to furnish Dorothy a place to live, while Dorothy was engaged in the narcotics traffic without defendant's participation, was itself an act which "in any manner facilitates the transportation, concealment or sale of any such narcotic drug".

All the jury had to find, under the court's instructions was that the defendant "knew" that he had the right to obtain narcotic drugs (A. 50). Thus, if the defendant had strong suspicions that Dorothy was keeping narcotics in

the box or if the jury felt that he should have known it because he lived with her, he was guilty under the court's instruction although he had not violated the statute.

The court's standard would be satisfied if A mails narcotics to B and then calls him to tell him that it is on the way, even though B may in no way have solicited the transaction.

The failure to instruct the jury on the elements of the offense is so uncompromisingly complete as to be utterly beyond argument.

The error was aggravated, rather than mitigated, by the trial court's act in giving the indictment to the jury with the statement that they were free to read it "* * * if you like." (A. 53). Even where the jury are told that they *must* read and consider the indictment, "* * * (T)he great weight of authority is that such practice is not sufficient * * *" *Morris* v. *United States*, 9 Cir. 1946, 156 F. 2d 525, 531.

But in the case at bar, the jury were told that they could read the indictment "* * * if you like." The clear inference was that while the jury might have a casual interest in learning the specific charges against the defendant, such information was not vital to the performance of their duties.

* * *

The superficial approach to the defendant's conviction is manifest with reference to the proofs introduced in support of every count of the indictment.

The Mack counts, Nos. 10 and 11, have already been discussed in detail. Count 7 charged that the defendant unlawfully possessed the contents of the safety deposit box on the day when that box was seized by the narcotics agents; and under the court's casual instructions, the jury

convicted on this count, notwithstanding that the prosecution evidence proved the defendant not guilty. Transcending the uncertainty of the responsibility for the contents of the safety deposit box, is the undisputed prosecution proof that on the day alleged in the indictment, and for many weeks preceding that date, the contents of the box were not in the possession, actual or constructive, of the defendant. Rather, they were possessed by the bank and by the state and federal authorities, holding adverse to the defendant, and denying him access to the box.

If this seems like a technicality, we can only say that it is a technicality which amounts to proof that the defendant is not guilty of the specific offense charged. But in narcotics prosecutions, apparently, the proofs which the jury hears must be unimportant because the allegations which they are intended to support are not made known to the jury. The question, essentially, is whether the defendant is a bad man or a good one; and presumably, good men are not indicted for narcotics violations, or indeed for any type of offense.

The remaining six counts relate to the Spaulding transactions. Three counts charged the possession of the substance received by Spaulding, and three charge its sale.

The simple fact is that, assuming Spaulding's testimony to be uncharacteristically true, whatever substance he received from the defendant was so diluted with other unidentified matter, as to render any subsequent analysis totally unpersuasive on the issue of what Spaulding originally received.

For Spaulding states only that he received a substance from the defendant and mixed it with something else. The chemist solemnly confirmed that the resulting mixture was a narcotic. But it cannot follow from this, that the defendant gave a narcotic substance to Spaulding.

Spaulding claims that on all relevant occasions, he mixed the substance obtained from the defendant with milk sugar and "mannitte". In order, therefore, to sustain defendant's conviction the evidence must somehow lead to the following conclusions:

1. The "milk sugar" contained in Spaulding's basement, obviously used in creating narcotic mixtures, somehow managed to retain a pristine identity as milk sugar and nothing else. Such a conclusion is tenuous at best when one considers that the activities in Spaulding's basement were apparently such as to endow the very air with a high narcotic quality.

2. Spaulding's "mannitte," whatever it was, was not a narcotic, and retained its unsullied but amorphous purity within the same fetid surroundings, while being used to dilute narcotics.

3. Therefore, any narcotic qualities found in any substance mixed with Spaulding's milk sugar and "mannitte" must necessarily derive from the original substance.

The foregoing conclusions find no support in the record.

Spaulding did not say anything from which it might be concluded that his milk sugar or his "mannitte" were, in fact, anything at all other than unknown substances to which he chose to apply those labels.

We strongly suggest that Spaulding's basement is hardly the place that a chemist would choose to run narcotics tests with scientific assurance that substances there exposed would not be contaminated by association with the "laboratory" itself.

We know of no rule of evidence more basic or monolithic than that as a condition of the admission of a physical exhibit, "* * * it must also be shown that no substan-

tial change has taken place in the article exhibited as to render the exhibit misleading." *Pilot Insurance Company* v. *Wise*, 61 F. 2d 481, 483, 5 Cir. 1932.

The Court of Appeals states that it "would be surprising" if the jury had not convicted the defendant, because the clandestine nature of the transaction described by the prosecution witnesses would be unlikely if some illegal transaction were not involved. But this rationale begs the question. Granted that the "involved and guarded maneuvers" referred to by the Court of Appeals would be cogent *corroboration* of proof of the offense, it cannot substitute for the *corpus delecti*.

The Court of Appeals' opinion omits consideration of the fact that the defendant was not charged with conspiring to sell heroin, nor with selling some amorphous substance under the pretext that it was heroin. Rather, he was charged with selling heroin. His actions, as described by Spaulding, are consistent with that charge. But they do not prove it.

At no stage of this litigation, apparently, has any distinction been made, in terms of probative value, between evidence consistent with guilt and evidence which proves guilt. And for these reasons, we submit that the record brought before Your Honors for review, is that of a typical narcotics prosecution.

The basic theory of the government's case, relating to all counts of the indictment, was that the defendant was responsible for the contents of the safety deposit box. The government proved that $160 which Spaulding says he gave to Defendant, plus a gun which it attempted to link to the defendant, were found in the box. Thereby, the government reasoned and argued, the defendant is connected with the contents of the box.

So far as the money is concerned, it need only be observed that Spaulding, by his own account, also gave money to Dorothy Nichols, who was the only one who ever went to the box. For proof that the specific bills, totaling $160 out of $12,000, were given by Spaulding to defendant and not to Dorothy, to whom he also gave money, we must rely solely upon the testimony of Spaulding, an admitted offender who was seeking to mitigate his punishment. More, even if it be believed that the defendant received the bills, the appearance within Dorothy's box of $160 which had been given to her husband, simply does not carry the sinister implication that the government would read into it.

The really telling evidence was the gun. Government witness Mack testified that in April, 1961, he received an Italian 25 calibre pistol (A. 28) from some men who had had illicit dealings with it (A. 30). He received the gun in a bag, took it out to look at it "just time enough . . . to see what kind it was" and gave it to the defendant an hour later (A. 30).

When witness next saw the gun does not appear, but he could not possibly have seen it until about four months later, when he was taken into custody (A. 30). The witness said that as far as he could see, the gun found in the box was the same gun, but that he does not know and "couldn't say offhand that this is definitely the same gun" (A. 30).

The gun was admitted into evidence as proving that something given to defendant was later found in the box, thus purportedly connecting the defendant with the box, notwithstanding that the gun found in the box was not Italian, but Spanish (A. 31).

The gun, with its attendant suggestions of violence, was extremely prejudicial, and totally unqualified as evidence. It was no part of the prosecution's legitimate case to prove that the defendant owned the gun. He was not charged with murder or robbery, and there is no suggestion that he ever engaged in violence of any sort. The gun had value only if it was proven to be the same gun that Mack says he gave the defendant. And such proofs were not made. Rather, it was proved that the gun found in the box *might* be the same one that Mack gave defendant. And in a narcotics prosecution, apparently, this is sufficient.

In the Court of Appeals, we argued that it was "incredible" that anyone should consider the gun qualified as evidence. The Court, in its opinion (Appendix A), held that the use of the word "incredible" sufficed to convert the issue from one of law, to one of fact. We believe that no better illustration of the prevalent attitude in this type of case, could be presented to your Honors.

* * *

The errors thus discussed permeate and taint the proofs introduced in support of every count of the indictment.

The poignancy of the perfunctory acceptance of suspicion as evidence, and the tenuous rationale by which the conviction was sustained, is heightened by the fact that it is simply unnecessary for courts so to depart from accepted juridical concepts, in order to abolish the narcotics traffic.

Even if the end justified the means, the means are simply ineffective. As the risk grows, the profit grows, and the traffic becomes more attractive. If there be a sincere desire to eliminate the traffic itself, and not merely to in

tensify the self-esteem of the enforcers, the method is clear. It is only necessary that narcotics be dispensed without charge, under controlled circumstances, to persons certified as addicts. "Pushers" will immediately cease their efforts to expand the traffic in their commodity, because the profit comes only when the customer has become an addict, and there will be no reason for an addict to pay $10 or $20 a day to support a habit which can be satisfied at no cost by walking to the nearest hospital. Addicts, for their part, will find it unnecessary to resort to robbery, prostitution, and other by-product crime in order to pay for the drug.

Of course, this remedy is legislative and not judicial in any sense. But its ready availability, makes clear the fact that there is simply no need to enlist the courts in the kind of warfare which results in sacrifice of judicial principle, as exemplified by the case at bar.

## CONCLUSION.

For the foregoing reasons, it is respectfully prayed that Your Honors will deem this case worthy of review.

Respectfully submitted,

MELVIN B. LEW,
*Attorney for Petitioner*

In the

# United States Court of Appeals

## For the Seventh Circuit

No. 13971 SEPTEMBER TERM, 1963 SEPTEMBER SESSION, 1963

| | |
|---|---|
| UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. ALPHONSO NICHOLS, *Defendant-Appellant*. | Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. |

September 18, 1963

Before HASTINGS, *Chief Judge*, and DUFFY and SCHNACKENBERG, *Circuit Judges*.

SCHNACKENBERG, *Circuit Judge*. Alphonso Nichols, defendant, has appealed from a judgment of conviction entered by the district court on an indictment charging violations of the United States narcotics laws, upon which he was sentenced to the custody of the attorney general for a period of seven years on each of nine counts, to run concurrently.

Counts VIII and IX were dismissed on motion of the government. The various remaining counts respectively charged defendant with unlawful receipt, concealment, and sales of heroin in violation of 26 U.S.C.A. § 4705(a) and 21 U.S.C.A. § 174 both as amended by the Narcotic Control Act of 1956.

Defendant pleaded not guilty and was tried before a jury. His motion for a new trial was denied.

1. In this court defendant first contends that the district court did not tell the jury the details of what the indictment charged, but merely gave the indictment to the jury and told them that they were free to examine it "* * * if you like."

No objection based upon this alleged error was made at the trial, but we feel justified, in view of the nature of defendant's contention, to consider it in this court.

We have read the record and find that the jury was instructed, *inter alia*:

> Now, let's deal specifically with the charges that are contained in the counts of the indictment which you are going to consider.
>
> The defendant is charged in Counts I, III, V and X, that is, four counts, with violation of Section 4705 (a) of the Internal Revenue Code of 1956, which reads as follows:
>
> > "It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given on a form to be issued in blank for that purpose by the Secretary of the Treasury or his delegate."
>
> In Counts II, IV, VI and VII of the indictment, the defendant is charged that on April 5, 1961, April 10, 1961, April 19, 1961, May 12, 1961 and June 27, 1961, that he then and there, fraudulently and knowingly received, concealed and facilitated the transportation and concealment, after unlawful importation into the United States of a quantity of a certain drug, to-wit, under Count II, 15.9 grams, Count IV, approximately

16.6, Count VI, approximately 15.950 grams, Count VII, approximately 42.320 grams, Count XI, approximately 11.305 grams, knowing the same to have been imported into the United States contrary to law, in violation of Section 174, Title 21, of the United States Code, as amended by the Narcotic Control Act of 1956.

The statute of the United States under which this violation is charged reads, in pertinent part, as follows:

> "Whoever fraudulently or knowingly receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to law, shall be," et cetera.

This is also part of the statute:

> "Whenever on trial for a violation of this section, the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

In this instance, of course, the defendant has denied having possession of any narcotic drugs at any time.

In *United States* v. *Jonikas*, 197 F. 2d 675, we approved a conviction of defendant for possessing and passing counterfeit bills. At page 679 we discussed defendant's contention that the district court failed to instruct the jury in relation to certain charges in the indictment. We said:

> "* * * Failure to describe more specifically the separate counts of the indictment did not deprive the defendant of any constitutional right nor deprive the court of jurisdiction to render the judgment."

We feel that the submission of the indictment to be examined by the jury, at its option, was of dubious value, although harmless.

We hold that the court's instructions as to the charges in the indictment were sufficient.

2. Defendant argues that the district court refused to properly consider the element of knowledge and the element of intent, in its instruction on the meaning of possession.

We disagree.

For instance, the court properly charged:

> Now, what does possession of a thing mean? It means having it in one's control or under one's dominion. It is not necessary that possession be direct or immediate or exclusive.
>
> If you find from the evidence that the defendant, although he may have had the right to obtain physical control of a substance, did not know that such substance was narcotic drugs, then such possession of the narcotic is not that possession contemplated by the law. In other words, you have to have knowing possession of illegal or 'contraband' products, such as narcotics, to constitute a violation of the law.

Moreover, we are satisfied that the jury was fully and correctly instructed on the law pertaining to reasonable doubt and presumption of innocence.

If anything, the court went out of its way to add the following instruction:

> For example, the presumption of innocence with which a defendant starts a trial is a presumption which the law requires you to make unless you find convincing evidence to the contrary. A presumption continues in effect until overcome or outweighed by evidence to the contrary. But if it is so outweighed, then

> you are to find whatever conclusion you draw from whatever evidence you have heard. If it is not so outweighed, you are bound to find in accordance with the presumption.

The court's solicitude for the rights of the defendant was emphasized by its concluding remarks to the jury:

> Let me reiterate, the defendant is presumed to be innocent unless you find beyond a reasonable doubt that the Government has established his guilt as to one or more counts of the indictment.

3. Asserting that the "most significant issue presented to the jury lay in the relationship between the defendant and the deceased known as Dorothy Nichols," defendant now concedes that drug addicts conducted transactions at defendant's home, but that he had no knowledge thereof. He points out that count VII relates to narcotics kept in a safe-deposit box which only Dorothy entered. However, it was stipulated at the trial that this box at a Chicago bank was leased to three persons, who were defendant, Dorothy and one Charles A. Ross.

In support of the testimony of certain witnesses, the government relied, *inter alia*, on evidence that a gun, government's exhibit F, was found in said box and the testimony of government witness Mack, who stated that, in April of 1961, he possessed an Italian 25 caliber silver pistol with scroll work on the side and a pearl handle; that about the middle of April, the exact date being unknown, he gave the weapon to defendant at his home. Mack, when asked to identify exhibit F, answered:

> "To the best of my knowledge, I believe this is the same weapon."

He added that, on the previous day, he had seen the weapon in the prosecutor's office, and had described it to agent Taylor at the time of his arrest.

On cross-examination, his attention was called to an inscription "made in Spain" on the gun and he stated that he had never read that inscription before.

The gun having been received in evidence over objection, defendant's motion for a mistrial was denied.

Witness Mack was thoroughly cross-examined about the gun by defense counsel.

In this court defendant asserts:

> "It is *incredible* that anybody could profess to reasonable assurance that the gun which Mack claims to have given the defendant was the same gun introduced in evidence." (Italics ours.)

Inasmuch as counsel for defendant expressly grounds his argument upon the basis of incredibility, he tacitly admits that the question of the identity of the gun found in the box as being the same as the weapon which he gave to defendant, was a question of fact for the jury. We hold that there was sufficient evidence to support the finding of fact by the jury, implicit in its verdict, that the gun found in the box was the gun that Mack had given to defendant.

4. Defendant argues that there was no showing that the substance allegedly received by Mack from defendant was heroin. We disagree.

On May 11, 1961, Mack telephoned the defendant and asked whether he could buy "two spoons of stuff", and the word "stuff" meaning heroin to the witness. After telephoning, and, pursuant to arrangements made with defendant, he went to the latter's home and gave him $270 and then, not hearing from defendant for four hours, he again went to his home and was told by defendant that he

was not ready. Thereupon, on the next morning, May 12, 1961, defendant called Mack and directed him to meet Dorothy Nichols at 63rd and Halsted streets. Going there he waited until she arrived and gave him a tin foil package containing a powder, which he took home and some of which he injected into his arm with a hypodermic needle. His reaction thereto he described to the court and jury. He received the same reaction from the injection of this powder that he always did.

Bank records showed that an entrance ticket to the box was issued on May 12, 1961 at 9:58 A.M. and it was signed by Dorothy.

A chemist in the government's internal revenue laboratory who examined a white powder found in the box, following the death of Dorothy, ascertained that the powder was heroin. She died June 13, 1961.

We are convinced that, from the evidence in the record, the jury was justified in finding beyond all reasonable doubt that the substance involved in the transactions covered by the indictment was heroin. Generally in support of our conclusion are *Tolivey v. United States*, 9 Cir., 224 F. 2d 742, 745 (1955), and *United States v. Agueci*, 2 Cir., 310 F. 2d 817, 828 (1962).

5. In proof of several counts, the government relied at the trial on testimony of Steve Spaulding that, after receiving a substance from defendant on April 5, 1961 and April 19, 1961, and from his wife on April 10, 1961, he returned to his home and diluted the packages with milk sugar and what is termed "mannitte". Defendant contends there resulted a lack of proof that the substance obtained from him and his wife was heroin.

Defendant admits that the chemist confirmed that the resulting mixture was a narcotic, but insists that it does not follow that defendant gave a narcotic substance to Spaulding.

There is evidence showing that on April 5, 1961, Spaulding called defendant and told him he wanted to "make up", which to him meant "buy some drugs". Arriving at defendant's home, he said that he wanted "two spoons of stuff", which to him meant heroin. He gave defendant $220 and received from him two glassine packages, which he wrapped up in tin foil and handed to Spaulding. On April 10, 1961 he received two glassine packages from defendant's wife. On April 10, 1961, he called defendant, told him he wanted to "make up" and upon arriving at defendant's home he was admitted by Dorothy Nichols and paid her $220. She went upstairs and returned with two packages which she began to wrap, when defendant entered and inquired whether anyone had followed Spaulding. Defendant looked out the window and saw a white man standing outside, whereupon he told his wife to return the money to Spaulding who left and went to a movie. After the movie he called defendant to "make up", returned to defendant's basement and gave him the $220. Defendant then gave him two glassine envelopes and told him to be careful. The jury might well have drawn an inference that Spaulding, the defendant and his wife, did not go through these involved and guarded maneuvers in order to deliver some innocuous powder to Spaulding, who would then return to his own basement and add the heroin, which was subsequently found in the chemical analysis. In fact a failure by the jury to draw such an inference would be surprising. None of these facts in evidence is inconsistent with a finding that the substance received by Spaulding from the defendant contained heroin.

6. Contrary to defendant's argument that the evidence did not suffice to prove guilt beyond a reasonable doubt we are required to apply to the evidence in the record the rule that the verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it. *Glasser* v. *United States*, 315 U. S. 60, 80; *United States* v. *Frierson*, 7 Cir., 299 F. 2d 763, 767 (1962). We hold that the evidence in the record meets this test beyond a reasonable doubt as to the guilt of defendant.

For these reasons we affirm the judgment from which this appeal was taken.

JUDGMENT AFFIRMED.

# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 564

ALPHONSO NICHOLS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. 29-37) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on September 18, 1963. The petition for a writ of certiorari was filed on October 17, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction.

2. Whether the instructions were adequate.

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on 9 counts of an 11 count indictment (R. 1-2)[1] charging offenses under the federal narcotic laws. More specifically, counts 1, 3, 5, and 10 charged the sale of heroin without receipt of a written order form in violation of 26 U.S.C. 4705(a), and counts 2, 4, 6, 7, and 11 charged knowing receipt and concealment of illegally imported heroin in violation of 21 U.S.C. 174.[2] Petitioner was sentenced to 7 years' imprisonment on each count, the sentences to run concurrently with each other (R. 2). The court of appeals unanimously affirmed the conviction (Pet. App. 29-37).

The evidence and the pertinent instructions may be summarized as follows:

1. Counts 1-6 dealt with three distinct but related purchases of heroin in April 1961.

On April 5, 1961, Charles Perry, a narcotics addict, after being searched by narcotic agent Cook, was given $380 in marked government currency and went

[1] "R." designates the appendix in the court of appeals now on file with the Clerk of this Court.

[2] Counts 8 and 9 were dismissed on the motion of the government at the close of its case (R. 33).

to the home of one Steve Spaulding to purchase narcotics (R. 6, 18-19, 23). Spaulding testified that, after he received the money from Perry, he telephoned petitioner and told him he wanted "to make up"—*i.e.*, to purchase drugs (R. 8). Spaulding then went to petitioner's home and asked him for "two spoons of stuff" which, to the witness, meant "two fourths of heroin." He gave petitioner $220 of the funds he had received from Perry, and in return, received two glassine packages wrapped in tinfoil. Spaulding then returned home and diluted "the stuff" with milk sugar and "mannitte". He then repackaged it and gave it to Perry who turned it over to agent Cook (counts 1 and 2; R. 6, 8, 18-19).

On April 10, 1961, Perry, this time accompanied by agent Cook, went to Spaulding's apartment to purchase more narcotics. Spaulding was given $300 in marked currency. He called petitioner's house and made arrangements with Dorothy Nichols, whom he knew as petitioner's wife. Spaulding thereafter went to petitioner's home, where, in exchange for $220, he received from Dorothy Nichols two glassine packages containing a white substance. Before he turned these packages over to Perry, Spaulding diluted the powder contained therein as he had done after the April 5th transaction. These packages were also turned over to agent Cook (counts 3 and 4, R. 6, 8-9, 32).[2]

---

[2] The events relating to the April 10th transaction were not permitted into evidence until after the trial court had found there was sufficient evidence to show that Dorothy Nichols had there acted as petitioner's agent (R. 14-15, 19-20, 32).

On April 19, 1961, Spaulding received $300 from agent Cook and once again telephoned petitioner and advised him he "wanted to make up." He was admitted to petitioner's home by Dorothy Nichols, to whom he gave $220. While he was waiting for Dorothy to wrap the "stuff," petitioner entered the room and asked Spaulding if he had been followed. Petitioner noted that someone was standing outside the window and decided to postpone the transaction for fear of disclosure. Spaulding then left the premises. He returned a few hours later and obtained the glassine envelopes from petitioner. He was told by petitioner to be careful. After again diluting the powder contained in these envelopes, Spaulding gave the packages to agent Cook (counts 5 and 6; R. 9, 20).

No written order form was presented by Spaulding at any of these transactions (R. 15, 32). The powder given to Cook after each sale was chemically tested and was found to contain heroin (R. 19-20, 23-24, 25-26).

Count 7 charged concealment of heroin on June 27, 1961. The evidence on this count showed that on February 28, 1957, petitioner and Dorothy Nichols rented a safe deposit box in a Chicago bank; that on June 19, 1961, following Dorothy's death, the vault was opened in accord with petitioner's request; that petitioner had not entered the bank vault before that date; and that the vault contained $12,000 in cash, a gun, bullets, and three envelopes containing white powder (R. 12-14, 15). The Narcotic Bureau was

informed of the contents of the vault (R. 13) and, on June 27, 1961, seized the items therein pursuant to a search warrant. Petitioner advised the agents that the money in the vault belonged to him and, as far as he knew, the powder belonged to his wife. Some of the money in the vault ($160) was found to be part of the marked government currency given by Perry to Spaulding and used by Spaulding to purchase narcotics from petitioner on April 5, 1961 (R. 16). The white powder was found to contain heroin (R. 16, 26). Ernest Lloyd Mack, who testified that he had purchased narcotics from petitioner (see *infra*), stated that, to the best of his knowledge, the gun found in the vault was the same one he had given to petitioner in the middle of April 1961 (R. 28).

Counts 10 and 11 related to purchases of narcotics by Mack. Mack was an addict who first testified to the reaction he received from an injection of heroin. He then described a purchase of narcotics made from petitioner on May 12, 1961, with funds provided by agent Cook. According to Mack, he arranged with petitioner over the telephone to buy "two spoons of stuff" and, after a number of delays, he received two glassine envelopes from Dorothy Nichols at a location pre-arranged with petitioner. No order form was given for this purchase. Mack returned home and injected some of the powder in the envelope into his arm. He stated that he had the reaction he always had from an injection of heroin. He gave the balance of the powder to a friend (R. 27-29).

Petitioner testified in his own defense and denied that he had ever sold narcotics to Spaulding or Mack. He claimed that, although he saw Spaulding in his home on April 10, 1961, Spaulding was in the company of Dorothy Nichols and that, when he saw money in Dorothy's hands belonging to Spaulding, he told the latter to leave. Petitioner further stated that he never put anything into the vault and that the only time he saw the gun found therein was when Dorothy had it (R. 33-35).

2. After instructing, *inter alia*, that a defendant is presumed to be innocent, that the government has the burden of proving guilt beyond a reasonable doubt (R. 40-41), and that persons associating in a common criminal scheme are responsible for the acts and statements of their co-partners in furtherance of the criminal object (R. 43-44), the court turned to the particular charges in this case. It informed the jury generally of the nature of the charges in the various counts of the indictment and read the pertinent provisions of the statutes involved. The court then pointed out that petitioner had denied possession of any narcotics and that proof of knowing possession was essential on the concealment counts, and defined possession and control for the jury (R. 48-50). In concluding its instructions the court stated (R. 52-53):

> Let me reiterate, the defendant is presumed to be innocent unless you find beyond a reasonable doubt that the Government has established his guilt as to one or more counts of the indictment.

You know what is charged. In several of the counts, the sale of narcotics is charged. In other counts, possession of narcotics is charged.

I will send the indictment to the jury room with you so you can examine it further, if you like.

## ARGUMENT

1. Petitioner challenges the sufficiency of the evidence on the ground that there was no direct proof that the substance he possessed and sold to Spaulding (counts 1-6) or to Mack (counts 10-11) contained heroin or that he concealed the narcotics found in the safety deposit box (count 7). As appears from the facts summarized in the statement, the evidence was, as the court of appeals found, sufficient to support the conviction on all counts. There is, in any event, no occasion for this Court to reexamine the evidence under each count. Since petitioner received concurrent sentences on each of the counts, the sufficiency of the evidence on any one will support his conviction. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1.

As to the Spaulding transactions, there was chemical analysis to show that the envelopes Spaulding gave to Perry and agent Cook contained heroin. Spaulding testified that he obtained the "stuff" from petitioner, diluted it and then transferred it to Perry or agent Cook. The fact that the analysis was made of the material as delivered by Spaulding does not support the argument that the material obtained by Spaulding from petitioner was not shown

to be heroin. It is inconceivable that Spaulding would have paid a substantial sum of money to petitioner simply to receive a harmless powder. As the court of appeals pointed out, "The jury might well have drawn an inference that Spaulding, the defendant and his wife, did not go through these involved and guarded maneuvers in order to deliver some innocuous powder to Spaulding, who would then return to his own basement and add the heroin, which was subsequently found in the chemical analysis" (Pet. App. 36).

2. There is no merit to petitioner's contention that the instructions were faulty in that the trial judge failed to set forth the charges in detail or relate them to the evidence. Essentially petitioner seems to be urging that the trial judge erred in failing to marshal the evidence for the jury. But the evidence was clear and in no way complex. The trial court sufficiently apprised the jury of the elements of the offenses charged, so that it could apply the law to the uncomplicated facts. Although the trial judge in reading the pertinent statutes to the jury did not state the dates of the sales charged in the sales counts, he did list the dates when referring to the corresponding counts charging the receipt of unlawfully imported narcotics (R. 48). Petitioner did not object to the instructions on the sale counts and shows no reason why his failure to object should not preclude him from raising the issue now. See Rule 30, F. R. Crim. P. As for the concealment counts, the court read the relevant statute to the jury, instructed that the evidence had to show knowing

possession, and defined the elements of possession and control.

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
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NOVEMBER 1963

U. S. GOVERNMENT PRINTING OFFICE